

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

SCOTT DAVID CREECH,

Plaintiff,

v.

**Civil Action 2:19-cv-104
Judge James L. Graham
Magistrate Judge Chelsey M. Vascura**

**OHIO DEPARTMENT OF
REHABILITATION & CORRECTIONS, *et al.*,**

Defendants.

ORDER and REPORT AND RECOMMENDATION

Plaintiff, Scott David Creech, a state inmate who is proceeding without the assistance of counsel, brings this action against the Ohio Department of Corrections and Rehabilitation (“ODRC”) and several individuals employed at ODRC, including at least two Doe Defendants, asserting that Defendants’ actions violated the Americans with Disabilities Act (“ADA”). This matter is before the Court for the initial screen of Plaintiff’s Complaint under 28 U.S.C. §§ 1915(e)(2) and 1915A to identify cognizable claims and to recommend dismissal of Plaintiff’s Complaint, or any portion of it, which is frivolous, malicious, fails to state a claim upon which relief may be granted, or seeks monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2); *see also McGore v. Wrigglesworth*, 114 F.3d 601, 608 (6th Cir. 1997). Having performed the initial screen, for the reasons that follow, the undersigned **RECOMMENDS** that be Plaintiff be permitted to proceed against the ODRC and that the Court **DISMISS** Plaintiff’s claims against the remaining defendants to the extent Plaintiff names these Defendants in their individual capacities.

This matter is also before the Court for consideration of Plaintiff's motion for leave to proceed *in forma pauperis* under 28 U.S.C. § 1915(a)(1) and (2), which is **GRANTED**. (ECF No. 1.) Plaintiff is required to pay the full amount of the Court's \$350 filing fee. 28 U.S.C. § 1915(b)(1). Plaintiff's certified trust fund statements reveal that he currently possesses \$259.45 in his prison account, which is insufficient to pay the filing fee.

Pursuant to 28 U.S.C. § 1915(b)(1), the custodian of Plaintiff's inmate trust accounts (Inmate Id Number A588782) at Chillicothe Correctional Institution is **DIRECTED** to submit to the Clerk of the United States District Court for the Southern District of Ohio as an initial partial payment, 20% of the greater of either the average monthly deposits to the inmate trust account or the average monthly balance in the inmate trust account, for the six-months immediately preceding the filing of the Complaint.

After full payment of the initial, partial filing fee, the custodian shall submit 20% of the inmate's preceding monthly income credited to the account, but only when the amount in the account exceeds \$10.00 until the full fee of \$350.00 has been paid to the Clerk of this Court. 28 U.S.C. § 1915(b)(2). *See McGore v. Wrigglesworth*, 114 F.3d 601 (6th Cir. 1997).

Checks should be made payable to: Clerk, United States District Court. The checks should be sent to:

Prisoner Accounts Receivable
260 U.S. Courthouse
85 Marconi Boulevard
Columbus, Ohio 43215

The prisoner's name and this case number must be included on each check.

It is **ORDERED** that Plaintiff be allowed to prosecute his action without prepayment of fees or costs and that judicial officers who render services in this action shall do so as if the costs

had been prepaid. The Clerk of Court is **DIRECTED** to mail a copy of this Order to Plaintiff and the prison cashier's office. The Clerk is further **DIRECTED** to forward a copy of this Order to the Court's financial office in Columbus.

I.

According to the Complaint, Plaintiff is an individual with a disability that impacts his ability to walk, stand, and maneuver as he walks. He alleges that as a result of this disability, he received Social Security Disability Income until he was incarcerated. Plaintiff alleges that he was prescribed and used a cane when he entered prison. When he was transferred to Chillicothe Correctional Institution ("CCI") in December 2008, his cane was taken from him initially, but then replaced when he complained. Subsequent to his incarceration, medical providers at CCI, as well as an orthopedic surgeon at Correctional Medical Center continued his prescription for a cane and also prescribed a bottom-bunk restriction. In August 2016, Nurse Practitioner Airtrip continued Plaintiff's bottom-bunk restriction, but disregarded the orthopedic doctor's prescription for a cane, taking his cane from him. Plaintiff alleges that without his cane, he has been unable to enjoy access to the exercise facilities and yard and that his access to the chow hall and law library have been limited when compared to individuals without mobility issues.

Plaintiff names the ODRC and a number of individuals employed by ODRC as Defendants. Plaintiff alleges that Defendants' actions violate the ADA and seeks monetary and injunctive relief.

II.

Congress enacted 28 U.S.C. § 1915, the federal *in forma pauperis* statute, seeking to "lower judicial access barriers to the indigent." *Denton v. Hernandez*, 504 U.S. 25, 31 (1992). In doing so, however, "Congress recognized that 'a litigant whose filing fees and court costs are

assumed by the public, unlike a paying litigant, lacks an economic incentive to refrain from filing frivolous, malicious, or repetitive lawsuits.’’ *Id.* at 31 (quoting *Neitzke v. Williams*, 490 U.S. 319, 324 (1989)). To address this concern, Congress included subsection (e) as part of the statute, which provides in pertinent part:

(2) Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that—

* * *

(B) the action or appeal--

(i) is frivolous or malicious;

(ii) fails to state a claim on which relief may be granted; or

28 U.S.C. § 1915(e)(2)(B)(i) & (ii); *Denton*, 504 U.S. at 31. Thus, § 1915(e) requires *sua sponte* dismissal of an action upon the Court’s determination that the action is frivolous or malicious, or upon determination that the action fails to state a claim upon which relief may be granted. *See Hill v. Lappin*, 630 F.3d 468, 470–71 (6th Cir. 2010) (applying Federal Rule of Civil Procedure 12(b)(6) standards to review under 28 U.S.C. §§ 1915A and 1915(e)(2)(B)(ii)).

To survive a motion to dismiss for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a plaintiff must satisfy the basic federal pleading requirements set forth in Federal Rule of Civil Procedure 8(a). Under Rule 8(a)(2), a complaint must contain a “short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). Although this pleading standard does not require “‘detailed factual allegations,’ . . . [a] pleading that offers ‘labels and conclusions’ or ‘a formulaic recitation of the elements of a cause of action,’’’ is insufficient. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Further, a complaint will not “suffice if it

tenders ‘naked assertion[s]’ devoid of ‘further factual enhancement.’” *Id.* (quoting *Twombly*, 550 U.S. at 557). Instead, to survive a motion to dismiss for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure, “a complaint must contain sufficient factual matter . . . to ‘state a claim to relief that is plausible on its face.’” *Id.* (quoting *Twombly*, 550 U.S. at 570). Facial plausibility is established “when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* In considering whether this facial plausibility standard is met, a Court must construe the complaint in the light most favorable to the non-moving party, accept all factual allegations as true, and make reasonable inferences in favor of the non-moving party. *Total Benefits Planning Agency, Inc. v. Anthem Blue Cross & Blue Shield*, 552 F.3d 430, 434 (6th Cir. 2008) (citations omitted). The Court is not required, however, to accept as true mere legal conclusions unsupported by factual allegations. *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555). In addition, the Court holds *pro se* complaints “to less stringent standards than formal pleadings drafted by lawyers.” *Garrett v. Belmont Cnty. Sheriff’s Dep’t*, No. 08-3978, 2010 WL 1252923, at *2 (6th Cir. Apr. 1, 2010) (quoting *Haines v. Kerner*, 404 U.S. 519, 520 (1972)).

III.

It is **RECOMMENDED** that Plaintiff be permitted to proceed with his ADA claim against the ODRC but that his claims against the remaining defendants be **DISMISSED** pursuant to § 1915(e)(2) to the extent Plaintiff names these defendants in their individual capacities.

“Title II of the ADA . . . extends to state prison inmates.” *Pa. Dep’t of Corr. v. Yeskey*, 524 U.S. 206, 213 (1998). Title II of the ADA states that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the

benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” 42 U.S.C. § 12132. “Under the ADA, the term ‘public entity’ is a broad one: it encompasses ‘any State or local government,’ as well as ‘any department, agency, special purpose district, or other instrumentality of a State or States or local government.’” *Tri-Cities Hldgs, LLC v. Tenn. Admin. Procedures Div.*, 726 F. App’x 298, 308 (6th Cir. 2018) (quoting 42 U.S.C. § 12131(1)(A)–(B)). “To establish a *prima facie* case of intentional discrimination under Title II of the ADA, a plaintiff must show that: (1) she has a disability; (2) she is otherwise qualified; and (3) she was being excluded from participation in, denied the benefits of, or subjected to discrimination under the program because of her disability.” *Id.* (quoting *Anderson v. City of Blue Ash*, 798 F.3d 338, 356 (6th Cir. 2015)). *See also Ability Ctr. of Greater Toledo v. City of Sandusky*, 385 F.3d 901, 907 (6th Cir. 2004) (“Title II does more than prohibit public entities from intentionally discriminating against disabled individuals. It also requires that public entities make reasonable accommodations for disabled individuals so as not to deprive them of meaningful access to the benefits of the services such entities provide.”). “In the typical Title II case, the plaintiff alleges she was denied reasonable accommodations in violation of the Act.” *Sjostrand v. Ohio State Univ.*, 750 F.3d 596, 599 (6th Cir. 2014).

Applied here, the undersigned finds that Plaintiff has plausibly alleged a Title II ADA claim against the ODRC, which is clearly a public entity as contemplated under the ADA. Plaintiff may not proceed against the remaining defendants in their individual capacities, however, because these individuals are not public entities. *See Williams v. McLemore*, 247 F. App’x 1, 8 (6th Cir. 2007) (“Title II of the ADA does not provide for a cause of action against government officials sued in their individual capacities. . . . We have held repeatedly that the

ADA does not permit public employees or supervisors to be sued in their individual capacities.” (citations omitted)). Thus, to the extent Plaintiff seeks to sue the defendants other than the ODRC in their individual capacities, it is **RECOMMENDED** that his claims against these Defendants be **DISMISSED**.

IV.

For the reasons set forth above, Plaintiff’s motion for leave to proceed *in forma pauperis* under 28 U.S.C. § 1915(a)(1) and (2) (ECF No. 1) is **GRANTED**. In addition, it is **RECOMMENDED** that the Plaintiff be permitted to proceed against the ODRC and that the Court **DISMISS** Plaintiff’s claims against the remaining defendants to the extent Plaintiff names these Defendants in their individual capacities.

The Clerk is **DIRECTED** to send a copy of this order to the Ohio Attorney General’s Office, 150 E. Gay St., 16th Floor, Columbus, Ohio 43215.

PROCEDURE ON OBJECTIONS

If any party objects to this Report and Recommendation, that party may, within fourteen (14) days of the date of this Report, file and serve on all parties written objections to those specific proposed findings or recommendations to which objection is made, together with supporting authority for the objection(s). A Judge of this Court shall make a *de novo* determination of those portions of the Report or specified proposed findings or recommendations to which objection is made. Upon proper objections, a Judge of this Court may accept, reject, or modify, in whole or in part, the findings or recommendations made herein, may receive further evidence or may recommit this matter to the Magistrate Judge with instructions. 28 U.S.C. § 636(b)(1).

The parties are specifically advised that failure to object to the Report and Recommendation will result in a waiver of the right to have the District Judge review the Report and Recommendation *de novo*, and also operates as a waiver of the right to appeal the decision of the District Court adopting the Report and Recommendation. *See Thomas v. Arn*, 474 U.S. 140 (1985); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981).

IT IS SO ORDERED.

/s/ Chelsey M. Vascura

CHELSEY M. VASCURA

UNITED STATES MAGISTRATE JUDGE